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8 UNITED STATES DISTRICT COURT  
9 WESTERN DISTRICT OF WASHINGTON  
AT TACOMA

10 KIMBERLY ANNE KEISTER,  
11 Plaintiff,

12 v.

13 MICHAEL J. ASTRUE, Commissioner  
14 of the Social Security Administration,  
15 Defendant.

CASE NO. 11-cv-05216-RBL-JRC

REPORT AND  
RECOMMENDATION ON  
PLAINTIFF'S COMPLAINT

NOTING DATE: MARCH 9, 2012

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17 This matter has been referred to United States Magistrate Judge J. Richard  
18 Creatura pursuant to 28 U.S.C. § 636(b)(1) and Local Magistrate Judge Rule MJR  
19 4(a)(4), and as authorized by Mathews, Secretary of H.E.W. v. Weber, 423 U.S. 261,  
20 271-72 (1976). Plaintiff has filed an Opening Brief (ECF No. 18) and defendant has filed  
21 a Response (ECF No. 19).

22 The ALJ failed to evaluate properly the appropriate period of alleged disability  
23 and failed without sufficient explanation or legitimate reasons to give controlling weight  
24

1 to the opinion by plaintiff's treating physician that plaintiff likely would suffer  
2 absenteeism of three or more days a month when attempting even sedentary work full  
3 time. The ALJ also erred in relying on plaintiff's limited daily activities when  
4 considering plaintiff's credibility without a finding of contradiction with plaintiff's  
5 testimony or a finding of transferability to a work setting.

6 For these reasons, the Court recommends that this matter be reversed and  
7 remanded pursuant to sentence four of 42 U.S.C. § 405(g) to the Commissioner for  
8 further administrative proceedings.

#### 9 BACKGROUND

10  
11 Plaintiff, KIMBERLY ANNE KEISTER, was born in 1956 and was fifty-one  
12 years old on her amended alleged onset date of disability of July 10, 2008 (Tr. 30-32,  
13 246). Plaintiff worked for six years as a dental assistant and nine years as a school bus  
14 driver, which was her last job (Tr. 70-71, 275). Plaintiff alleged that she was limited in  
15 her ability to work initially by joint pain and muscle pain and that her breathing problems  
16 began to affect her after that (Tr. 70-71).

#### 17 PROCEDURAL HISTORY

18 Plaintiff filed an application for disability insurance benefits in September, 2006  
19 (Tr. 248-50). Her application was denied initially and following reconsideration (Tr. 148-  
20 51, 154-55). Her requested hearing was held before Administrative Law Judge Thomas  
21 Robinson ("the ALJ") on February 20, 2009 (Tr. 59-85). On May 6, 2009, the ALJ issued  
22 a written decision in which he found that plaintiff was not disabled pursuant to the Social  
23 Security Act (Tr. 101-11). On September 24, 2009, the Appeals Council vacated the May  
24

1 6, 2009 decision and remanded the case back to the ALJ for further administrative  
2 proceedings (Tr. 112-14).

3 On June 3, 2010, the ALJ held another hearing (Tr. 24-58). On August 5, 2010,  
4 the ALJ issued a second written decision in which he again found that plaintiff was not  
5 disabled pursuant to the Social Security Act (Tr. 10-21). On February 17, 2011, the  
6 Appeals Council denied plaintiff's request for review of this second decision, making the  
7 August 5, 2010 written decision by the ALJ the final agency decision subject to judicial  
8 review (Tr. 1-4). See 20 C.F.R. § 404.981.

9  
10 On March 21, 2011, plaintiff filed a Complaint seeking judicial review of the  
11 ALJ's August 5, 2010 written decision (see ECF No. 1). On June 23, 2011, defendant  
12 filed the sealed administrative record regarding this matter ("Tr.") (see ECF No. 15). In  
13 her Opening Brief, plaintiff contends that the ALJ erred in, among other things, his  
14 review of: (1) the medical evidence; (2) plaintiff's credibility; and (3) lay testimony (see  
15 Opening Brief, ECF No. 18, pp. 1-2). Plaintiff complains that the ALJ erred in assessing  
16 plaintiff's Residual Functional Capacity ("RFC") and that the ALJ's finding that plaintiff  
17 could perform other work existing in the national economy at step five of the sequential  
18 disability evaluation process was erroneous (see id.).

### 19 STANDARD OF REVIEW

20 Plaintiff bears the burden of proving disability within the meaning of the Social  
21 Security Act (hereinafter "the Act"). Meanel v. Apfel, 172 F.3d 1111, 1113 (9th Cir.  
22 1999); see also Johnson v. Shalala, 60 F.3d 1428, 1432 (9th Cir. 1995). The Act defines  
23 disability as the "inability to engage in any substantial gainful activity" due to a physical  
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1 or mental impairment “which can be expected to result in death or which has lasted, or  
2 can be expected to last for a continuous period of not less than twelve months.” 42 U.S.C.  
3 §§ 423(d)(1)(A), 1382c(a)(3)(A). Plaintiff is disabled under the Act only if plaintiff’s  
4 impairments are of such severity that plaintiff is unable to do previous work, and cannot,  
5 considering the plaintiff’s age, education, and work experience, engage in any other  
6 substantial gainful activity existing in the national economy. 42 U.S.C. §§ 423(d)(2)(A),  
7 1382c(a)(3)(B); see also Tackett v. Apfel, 180 F.3d 1094, 1098-99 (9th Cir. 1999).

8  
9 Pursuant to 42 U.S.C. § 405(g), this Court may set aside the Commissioner's  
10 denial of social security benefits if the ALJ's findings are based on legal error or not  
11 supported by substantial evidence in the record as a whole. Bayliss v. Barnhart, 427 F.3d  
12 1211, 1214 n.1 (9th Cir. 2005) (*citing* Tidwell v. Apfel, 161 F.3d 599, 601 (9th Cir.  
13 1999)). “Substantial evidence” is more than a scintilla, less than a preponderance, and is  
14 such ““relevant evidence as a reasonable mind might accept as adequate to support a  
15 conclusion.”” Magallanes v. Bowen, 881 F.2d 747, 750 (9th Cir. 1989) (*quoting* Davis v.  
16 Heckler, 868 F.2d 323, 325-26 (9th Cir. 1989)); see also Richardson v. Perales, 402 U.S.  
17 389, 401 (1971). Regarding the question of whether or not substantial evidence supports  
18 the findings by the ALJ, the Court should ““review the administrative record as a whole,  
19 weighing both the evidence that supports and that which detracts from the ALJ’s  
20 conclusion.”” Sandgathe v. Chater, 108 F.3d 978, 980 (1996) (per curiam) (*quoting*  
21 Andrews, supra, 53 F.3d at 1039). In addition, the Court ““must independently determine  
22 whether the Commissioner’s decision is (1) free of legal error and (2) is supported by  
23 substantial evidence.”” See Bruce v. Astrue, 557 F.3d 1113, 1115 (9th Cir. 2006) (*citing*  
24

1 Moore v. Comm’r of the Soc. Sec. Admin., 278 F.3d 920, 924 (9th Cir. 2002)); Smolen  
2 v. Chater, 80 F.3d 1273, 1279 (9th Cir. 1996).

3 According to the Ninth Circuit, “[l]ong-standing principles of administrative law  
4 require us to review the ALJ’s decision based on the reasoning and actual findings  
5 offered by the ALJ - - not *post hoc* rationalizations that attempt to intuit what the  
6 adjudicator may have been thinking.” Bray v. Comm’r of SSA, 554 F.3d 1219, 1226-27  
7 (9th Cir. 2009) (*citing* SEC v. Chenery Corp., 332 U.S. 194, 196 (1947) (other citation  
8 omitted)); *see also* Stout v. Commissioner of Soc. Sec., 454 F.3d 1050, 1054 (9th Cir.  
9 2006) (“we cannot affirm the decision of an agency on a ground that the agency did not  
10 invoke in making its decision”) (citations omitted). For example, “the ALJ, not the  
11 district court, is required to provide specific reasons for rejecting lay testimony.” Stout,  
12 *supra*, 454 F.3d at 1054 (*citing* Dodrill v. Shalala, 12 F.3d 915, 919 (9th Cir. 1993)). In  
13 the context of social security appeals, legal errors committed by the ALJ may be  
14 considered harmless where the error is irrelevant to the ultimate disability conclusion.  
15 Stout, *supra*, 454 F.3d at 1054-55 (reviewing legal errors found to be harmless).

## 16 DISCUSSION

- 17  
18 1. The ALJ failed to consider the appropriate period of time regarding plaintiff’s  
19 alleged date of disability onset.

20 Plaintiff contends that the ALJ failed to consider the appropriate period of time  
21 regarding plaintiff’s alleged date of disability onset (*see* Opening Brief, ECF No. 18, p.  
22 3). Defendant responds that plaintiff did not allege any prejudice from this issue and  
23 failed to demonstrate harm (*see* Response, ECF No. 19, pp. 8-9).  
24

1 At plaintiff's June 3, 2010 hearing, her attorney indicated the intention to amend  
2 plaintiff's alleged date of disability onset to July 10, 2008 (Tr. 30-32). However, the ALJ  
3 included in his written decision the finding that at "the most recent hearing, the alleged  
4 onset date was affirmed as June 2006" (Tr. 13).

5 The ALJ failed to find that plaintiff was disabled in part due to reliance on the  
6 October 11, 2006 treatment records of Dr. Ashwin Rao, M.D. ("Dr. Rao") (see Tr. 18).  
7 The ALJ supports his failure to credit fully plaintiff's testimony in part on the finding that  
8 objective "medical findings do not reveal the degree of dysfunction alleged by the  
9 claimant" (id.). The ALJ supported this finding by noting that "at the time of examination  
10 by Dr. Rao, the claimant was able to perform coordination tests without difficulty" (id.).  
11 The ALJ cites other objective evidence from Dr. Rao's October 11, 2006 examination  
12 apparently without realizing that this examination occurred almost two years prior to  
13 plaintiff's amended alleged disability onset date of July 10, 2008 (Tr. 30-32).  
14

15 When considering the evidence from medical sources, the ALJ explicitly gave  
16 great weight to Dr. Rao's October 11, 2006 opinion (Tr. 18). The ALJ also discussed the  
17 opinions of non-examining state agency medical consultants, who relied on Dr. Rao's  
18 October 11, 2006 opinion (see id.). Therefore, in addition to relying on this evidence  
19 from over a year and a half prior to plaintiff's alleged onset date of disability in order to  
20 discount plaintiff's testimony, the ALJ also relied on this evidence in his discussion of  
21 the medical evidence in support of his discounting of the medical opinion of plaintiff's  
22 treating physician, Dr. Robert Thorpe, M.D. ("Dr. Thorpe") (see id.).  
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1 Although the opinion of Dr. Rao relied on by the ALJ is relevant, it is likely that  
2 the ALJ gave it more weight than it was due, as the ALJ apparently considered the  
3 opinion to be within the time frame of plaintiff's alleged disability. As the ALJ relied on  
4 this opinion, as well as the opinion based on Dr. Rao's opinion by the non-examining  
5 state agency medical consultants, both in failing to credit plaintiff's testimony as well as  
6 in his review of the medical evidence, this factor weighs against a finding by this Court  
7 that the ALJ's decision is based on substantial evidence in the record as a whole. Here,  
8 plaintiff testified that things had gotten worse for her somewhat since her diagnosis with  
9 chronic obstructive pulmonary disorder (see Tr. 36). In order for the ALJ to rely properly  
10 on evidence from prior to plaintiff's alleged onset date of disability in order to find that  
11 plaintiff was not disabled, the ALJ should have indicated his awareness of the fact that  
12 the treatment records on which he was relying pre-dated plaintiff's date of alleged onset  
13 of disability. As plaintiff does not contend that she was disabled until July 10, 2008, the  
14 ALJ's citation to evidence from over a year prior to July 10, 2008 does little to  
15 demonstrate that plaintiff was not disabled after July 10, 2008. Because the ALJ here  
16 relied heavily on evidence substantially before July 10, 2008 in order to find that plaintiff  
17 was not disabled after July 10, 2008 without awareness of plaintiff's actual alleged date  
18 of disability onset, the Court concludes that this error by the ALJ was not harmless.

20 2. The ALJ failed to evaluate properly the medical evidence.

21 a. The ALJ did not evaluate properly plaintiff's alleged date of disability onset

22 The Court already has concluded that the ALJ erred by relying on the opinions by  
23 Dr. Rao in 2006 and the opinions of the reviewing state agency medical consultants based  
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1 on Dr. Rao's opinion without explicit discussion that this evidence predated plaintiff's  
2 alleged date of disability, see supra, section 1. The ALJ relied on this evidence predating  
3 plaintiff's alleged onset of disability when reviewing the medical evidence and failing to  
4 give controlling weight to plaintiff's treating physician, Dr. Thorpe.

5 b. The ALJ failed to provide legitimate reasons for his failure to give controlling  
6 weight to the opinions by treating physician Dr. Thorpe.

7 "A treating physician's medical opinion as to the nature and severity of an  
8 individual's impairment must be given controlling weight if that opinion is well-  
9 supported and not inconsistent with the other substantial evidence in the case record."  
10 Edlund v. Massanari, 2001 Cal. Daily Op. Srv. 6849, 2001 U.S. App. LEXIS 17960 at  
11 \*14 (9th Cir. 2001) (*citing* SSR 96-2p, 1996 SSR LEXIS 9); see also 20 C.F.R. § 416.902  
12 (non-treating physician is one without "ongoing treatment relationship"). The decision  
13 must "contain specific reasons for the weight given to the treating source's medical  
14 opinion, supported by the evidence in the case record, and must be sufficiently specific to  
15 make clear to any subsequent reviewers the weight the adjudicator gave to the []  
16 opinion." SSR 96-2p, 1996 SSR LEXIS 9. However, "[t]he ALJ may disregard the  
17 treating physician's opinion whether or not that opinion is contradicted." Batson v.  
18 Commissioner of Social Security Administration, 359 F.3d 1190, 1195 (9th Cir. 2004)  
19 (*quoting* Magallanes v. Bowen, 881 F.2d 747, 751 (9th Cir. 1989)).

20 The ALJ must provide "clear and convincing" reasons for rejecting the  
21 uncontradicted opinion of either a treating or examining physician or psychologist.  
22 Lester v. Chater, 81 F.3d 821, 830 (9th Cir. 1996) (*citing* Baxter v. Sullivan, 923 F.2d  
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1 1391, 1396 (9th Cir. 1991); Pitzer v. Sullivan, 908 F.2d 502, 506 (9th Cir. 1990)). Even if  
2 a treating or examining physician's opinion is contradicted, that opinion "can only be  
3 rejected for specific and legitimate reasons that are supported by substantial evidence in  
4 the record." Lester, supra, 81 F.3d at 830-31 (*citing* Andrews v. Shalala, 53 F.3d 1035,  
5 1043 (9th Cir. 1995)). The ALJ can accomplish this by "setting out a detailed and  
6 thorough summary of the facts and conflicting clinical evidence, stating his interpretation  
7 thereof, and making findings." Reddick, supra, 157 F.3d at 725 (*citing* Magallanes v.  
8 Bowen, 881 F.2d 747, 751 (9th Cir. 1989)).

10 In general, more weight is given to a treating medical source's opinion than to the  
11 opinions of those who do not treat the claimant. Lester, supra, 81 F.3d at 830 (*citing*  
12 Winans v. Bowen, 853 F.2d 643, 647 (9th Cir. 1987)). On the other hand, an ALJ need  
13 not accept the opinion of a treating physician, if that opinion is brief, conclusory and  
14 inadequately supported by clinical findings or by the record as a whole. Batson v.  
15 Commissioner of Social Security Administration, 359 F.3d 1190, 1195 (9th Cir. 2004)  
16 (*citing* Tonapetyan v. Halter, 242 F.3d 1144, 1149 (9th Cir. 2001)); *see also* Thomas v.  
17 Barnhart, 278 F.3d 947, 957 (9th Cir. 2002). An examining physician's opinion is  
18 "entitled to greater weight than the opinion of a nonexamining physician." Lester, supra,  
19 81 F.3d at 830 (citations omitted); *see also* 20 C.F.R. § 404.1527(d). A non-examining  
20 physician's or psychologist's opinion may not constitute substantial evidence by itself  
21 sufficient to justify the rejection of an opinion by an examining physician or  
22 psychologist. Lester, supra, 81 F.3d at 831 (citations omitted). However, "it may  
23 constitute substantial evidence when it is consistent with other independent evidence in  
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1 the record.” Tonapetyan, supra, 242 F.3d at 1149 (*citing* Magallanes, supra, 881 F.2d at  
2 752). “In order to discount the opinion of an examining physician in favor of the opinion  
3 of a nonexamining medical advisor, the ALJ must set forth specific, *legitimate* reasons  
4 that are supported by substantial evidence in the record.” Van Nguyen v. Chater, 100  
5 F.3d 1462, 1466 (9th Cir. 1996) (*citing* Lester, supra, 81 F.3d at 831); see also 20 C.F.R.  
6 § 404.1527(d)(2)(i) (when considering medical opinion evidence, the Commissioner will  
7 consider the length and extent of the treatment relationship).

8  
9 Here, the ALJ failed to give controlling weight to the opinion of treating  
10 physician, Dr. Thorpe, as to the nature and severity of plaintiff’s impairment, therefore  
11 the ALJ was required to find that Dr. Thorpe’s opinion was not well-supported or that it  
12 was inconsistent with the other substantial evidence in the record. See Edlund, supra,  
13 2001 U.S. App. LEXIS 17960 at \*14. The Court already has discussed the ALJ’s  
14 reference to treatment records by Dr. Rao from over a year prior to plaintiff’s alleged  
15 onset date of disability, see supra, section 1. The other medical evidence relied on by the  
16 ALJ were those opinions provided by the non-examining medical expert, Dr. Sami A.  
17 Nafosoi, M.D. (“Dr. Nafosoi”) and the examining physician, Dr. Rex Bolin, M.D. (“Dr.  
18 Bolin”). For the reasons discussed below, the Court finds that Dr. Thorpe’s opinion was  
19 well-supported by his treatment records and that Dr. Thorpe’s opinion was not  
20 inconsistent with other substantial evidence in the record cited by the ALJ. See Edlund,  
21 supra, 2001 U.S. App. LEXIS 17960 at \*14.

22  
23 Dr. Thorpe first examined plaintiff on July 8, 2008 (Tr. 729). He indicated  
24 plaintiff’s subjective report of shortness of breath and cough (id.). He noted plaintiff’s

1 report that she was down to smoking a pack of cigarettes a day from two packs a day  
2 (id.). He indicated that plaintiff was positive for “productive cough, wheezing, shortness  
3 of breath” (id.). Dr. Thorpe assessed that plaintiff suffered from “bronchitis; probable  
4 chronic obstructive pulmonary disease; tobacco abuse; questionable hypertension; and  
5 mixed connective tissue disease” (id.). Dr. Thorpe advised plaintiff to quit smoking,  
6 ordered various tests and prescribed various medications (id.).  
7

8         On July 22, 2008, Dr. Thorpe examined plaintiff (Tr. 727). He assessed chronic  
9 obstructive pulmonary disease and advised plaintiff to continue using her inhaler (id.).  
10 Dr. Thorpe examined plaintiff again on September 18, 2008 (Tr. 725). He indicated  
11 plaintiffs’ subjective report of increasing cough and some shortness of breath (id.). On  
12 examination of plaintiff’s lungs, Dr. Thorpe indicated his observation of “distant breath  
13 sounds but clear” (id.). He assessed plaintiff with bronchitis and chronic obstructive  
14 pulmonary disease, as well as hypertension (id.).  
15

16         Plaintiff also had a pulmonary function test on September 18, 2008 (Tr. 739). The  
17 test results indicated, among other things, that plaintiff’s lung age was 99 years and her  
18 FEV1 (forced expiratory volume in one second) was almost identical post-medication as  
19 pre-medication (id. (FEV1 values of 1.32 and 1.31)). Dr. Thorpe assessed the objective  
20 test results as “significant restrictive/obstructive changes consistent with COPD” (id.).  
21

22         On October 9, 2008, plaintiff was examined again by Dr. Thorpe (Tr. 723). He  
23 noted that plaintiff’s “chest x-ray showed some evidence of streaky bronchiectasis right  
24 upper lobe” (id.). He assessed that plaintiff was suffering from an acute exacerbation of  
her chronic obstructive pulmonary disease and adjusted her medications (id.). On

1 November 12, 2008, Dr. Thorpe examined plaintiff at a follow-up appointment (Tr. 721).  
2 He assessed that plaintiff suffered from hypertenstion; chronic obstructive pulmonary  
3 disease/tobacco abuse; and, mixed connective tissue disease (id.). Dr. Thorpe prescribed  
4 plaintiff lisinopril/HCTZ and gave her samples of spiriva (id.).

5         On February 9, 2009, Dr. Thorpe examined plaintiff and observed that her lungs  
6 were clear but exhibited “distant breath sounds” (Tr. 747). He indicated that her  
7 pulmonary functions tests “as previously reported showed marked restrictive lung  
8 disease” (id.). At this time, he assessed that plaintiff suffered from “chronic obstructive  
9 pulmonary disease, relatively severe; mixed connective tissue disease; hypertension, not  
10 optimally controlled; and nighttime foot cramps” (id.). Dr. Thorpe adjusted plaintiff’s  
11 medications (id.).

12         Also on February 9, 2009, Dr. Thorpe indicated his opinion that plaintiff’s  
13 complaints of periodically severe fatigue and shortness of breath both on exertion and  
14 often without exertion were credible and that she was not a malingerer (Tr. 684-85). Dr.  
15 Thorpe opined specifically that if plaintiff had attempted even sedentary work since June,  
16 2003 on a full time basis, that the combination of her medical impairments would have  
17 resulted in absenteeism of three or more days per month on a more probable than not  
18 basis (id.).

19         On August 28, 2009, Dr. Thorpe examined plaintiff and observed “clear, distant  
20 breath sounds” in her lungs (Tr. 746). He assessed that her hypertension was possibly  
21 “over treated,” and assessed again that plaintiff suffered from chronic obstructive  
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1 pulmonary disease/tobacco abuse and mixed connective tissue disease (id.). He adjusted  
2 her medications and again recommended that plaintiff quit smoking (id.).

3 Plaintiff had a second pulmonary function test on December 4, 2009 (Tr. 753).  
4 Test result indicated, among other things, that plaintiff's lung age was 72 years and that  
5 she demonstrated improvement following the administration of bronchodilators (id.). Dr.  
6 Thorpe assessed the results as restrictive/obstructive pattern consistent with COPD,  
7 improved with bronchodilators (id.).

8 Plaintiff had a third pulmonary function test on February 16, 2010 (Tr. 686-88).  
9 These tests results indicated the greatest degree of change in FEV1 after medication of all  
10 of the three tests (Tr. 686). The test results were assessed by Dr. Barry J. Weled, M.D.,  
11 who opined that the tests demonstrated "moderate reversible airways disease consistent  
12 with chronic obstructive pulmonary disease and/or asthma" (Tr. 688).

13 The ALJ failed to discuss the vast majority of the treatment records by treating  
14 physician, Dr. Thorpe. For example, the ALJ failed to mention any of Dr. Thorpe's  
15 examinations of plaintiff or his objective findings based on his examinations, such as  
16 breath sounds in her lungs. The ALJ failed to mention that Dr. Thorpe assessed plaintiff's  
17 chronic obstructive pulmonary disease as relatively severe (Tr. 747) or that he assessed  
18 that she suffered from acute exacerbation in October, 2008 (Tr. 723). As the ALJ  
19 discussed and relied on opinions from non-examining sources, as well as on sources pre-  
20 dating plaintiff's alleged onset date (see Tr. 18), the ALJ's failure to discuss the treatment  
21 notes from plaintiff's treating physician during the relevant time frame is particularly  
22 problematic. The treatment records and opinions of Dr. Thorpe are significant, probative  
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1 evidence that the ALJ should have discussed. See Flores v. Shalala, 49 F.3d 562, 570-71  
2 (9th Cir. 1995) (*quoting* Vincent v. Heckler, 739 F.2d 1393, 1395 (9th Cir. 1984)  
3 (*quoting* Cotter v. Harris, 642 F.2d 700, 706-07 (3d Cir. 1981))).

4         The ALJ gave one reason to disregard Dr. Thorpe’s opinion that it was more  
5 probable than not that plaintiff would be absent three or more days per month as a result  
6 of her impairments if she attempted even sedentary work full time (Tr. 19; see also Tr.  
7 684-85). The ALJ indicated that “Dr. Thorpe did not give any objective medical findings  
8 in support of this extreme conclusion” (Tr. 19). However, Dr. Thorpe was plaintiff’s  
9 treating physician and the Court has discussed much objective medical evidence from Dr.  
10 Thorpe’s treatment notes, including objective observation of breath noises following  
11 examination of the lungs on multiple occasions (see, e.g., Tr. 746), results from  
12 pulmonary functions tests, which Dr. Thorpe assessed (Tr. 739, 753), as well as  
13 plaintiff’s chest x-ray, which Dr. Thorpe assessed as showing “some evidence of streaky  
14 bronchiectasis right upper lobe”(Tr. 723).

16         It is clear from the record that Dr. Thorpe’s opinion regarding plaintiff’s likely  
17 absenteeism was based on his many examinations of plaintiff and the various objective  
18 tests on plaintiff, such as pulmonary function tests and a chest x-ray. For this reason, and  
19 based on the relevant record, the Court concludes that the ALJ’s finding that Dr. Thorpe  
20 did not provide objective medical findings in support of his opinion regarding plaintiff’s  
21 likely absenteeism is not a finding based on substantial evidence in the record as a whole.  
22 As a result, the ALJ’s failure to credit this opinion of plaintiff’s treating physician, Dr.  
23

1 Thorpe, on this basis should be reversed for further evaluation. See Edlund, supra, 2001  
2 U.S. App. LEXIS 17960 at \*14; Magallanes v. Bowen, 881 F.2d 747, 750.

3       Regarding the extent to which Dr. Thorpe’s opinion was consistent with the rest of  
4 the substantial evidence in the record, plaintiff has referenced a scientific research article  
5 suggesting that COPD does not produce disabling shortness of breath or fatigue at all  
6 times, but results in periods of exacerbation (see Opening Brief, ECF No. 18, p. 10).  
7 More importantly, Dr. Thorpe, plaintiff’s treating physician, opined that the severity of  
8 plaintiff’s impairment fluctuated and included periodic exacerbation (see, e.g., Tr. 723).  
9 Therefore, the fact that plaintiff’s third pulmonary test indicated better functioning than  
10 her first pulmonary test does not make Dr. Thorpe’s opinion inconsistent with the  
11 objective medical evidence in the record as a whole.

13       Similarly, although Dr. Rex Bolin, M.D. (“Dr. Bolin”) assessed differently the  
14 severity of plaintiff’s impairment, Dr. Bolin was a non-treating, examining physician,  
15 who evaluated plaintiff on one occasion and did not discuss all of plaintiff’s test results.  
16 In addition, Dr. Bolin indicated that his judgments were made on his review of “limited  
17 data” and that he could not “attest to the quality” (Tr. 691).

18       For these reasons, and based on the relevant record, the Court concludes that the  
19 ALJ did not give specific and legitimate reasons supported by substantial evidence in the  
20 record for his rejection of Dr. Thorpe’s opinion. See Lester, supra, 81 F.3d at 830-31.  
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1 c. The ALJ did not explain adequately why Dr. Nafosi's opinion regarding  
2 environmental limitations on plaintiff's ability to work were not adopted  
3 Although the ALJ relied in part on Dr. Nafosi's opinion when failing to give  
4 controlling weight to the opinion by plaintiff's treating physician, Dr. Thorpe, the ALJ  
5 failed to include all of the limitations from Dr. Nafosi's opinion in his assessment of  
6 plaintiff's residual functional capacity ("RFC"). Dr. Nafosi opined that plaintiff was  
7 limited to working with no concentrated exposure to dust, chemicals, fumes vapors and  
8 sudden temperature changes (see Tr. 47). The ALJ failed to adopt this limitation without  
9 explicitly explaining the discrepancy (see Tr. 17). The Court notes that the ALJ included  
10 the following discussion in a separate portion of the opinion:  
11

12 I have determined that the job as a sheller could still be performed even  
13 if [plaintiff's] RFC included the need to avoid fumes, gases, and odors.  
14 With the addition of this restriction, the vocational expert eliminated this  
15 job from consideration. However, as the claimant continues to smoke  
16 cigarettes, I have not found any environmental limits that would not be  
17 less severe than intentionally inhaling smoke.

18 (Tr. 20).

19 The ALJ appears to be putting his own interpretation of the medical record over  
20 that of the doctor. While it may be tempting for an ALJ to consider the obvious  
21 incongruity of a smoker eliminating environmental contaminants such as fumes, gasses  
22 and odors, Dr. Nafosi was aware of plaintiff's smoking, and nevertheless, opined that  
23 she suffered environmental limitations on her ability to work.

24 According to Social Security Ruling ("SSR") 96-8p, a residual functional capacity  
assessment by the ALJ "must always consider and address medical source opinions. If the



1 RFC assessment conflicts with an opinion from a medical source, the adjudicator must  
2 explain why the opinion was not adopted.” SSR 96-8p, 1996 SSR LEXIS 5 at \*20. For  
3 the reasons discussed, and based on the relevant record, the Court concludes that the ALJ  
4 did not explain adequately why the opinion from Dr. Nafsoosi regarding plaintiff’s  
5 environmental limitations was not adopted into plaintiff’s RFC. See id.; see also Reddick,  
6 supra, 157 F.3d at 725. On remand, the ALJ should provide further clarification of this  
7 analysis.

- 8  
9 3. The ALJ erred when considering plaintiff’s credibility and plaintiff’s testimony  
10 should be considered anew following remand of this matter.

11 The ALJ relied on “objective medical findings”, in part, to fail to credit fully  
12 plaintiff’s testimony (see Tr. 18). The Court already has determined that the ALJ erred in  
13 his review of the medical evidence, see supra, section 2. In addition, a determination of  
14 plaintiff’s credibility relies on the assessment of the medical evidence. See 20 C.F.R. §  
15 404.1529(c). The Court also concludes that the ALJ committed legal error in his review  
16 of plaintiff’s testimony, as discussed below.

17 Regarding activities of daily living, the Ninth Circuit “has repeatedly asserted that  
18 the mere fact that a plaintiff has carried on certain daily activities . . . . does not in any  
19 way detract from her credibility as to her overall disability.” Orn v. Astrue, 495 F.3d 625,  
20 639 (9th Cir. 2007 (*quoting* Vertigan v. Halter, 260 F.3d 1044, 1050 (9th Cir. 2001))). The  
21 Ninth Circuit specified “the two grounds for using daily activities to form the basis of an  
22 adverse credibility determination:” (1) whether or not they contradict the claimant’s other  
23 testimony; and (2) whether or not the activities of daily living meet “the threshold for  
24

1 transferable work skills.” Orn, supra, 495 F.3d at 639 (*citing* Fair, supra, 885 F.2d at  
2 603). As stated by the Ninth Circuit, the ALJ “must make ‘specific findings relating to  
3 the daily activities’ and their transferability to conclude that a claimant’s daily activities  
4 warrant an adverse credibility determination. Orn, supra, 495 F.3d at 639 (*quoting* Burch  
5 v. Barnhart, 400 F.3d 676, 681 (9th Cir. 2005)).

6 Here, the ALJ included the following in his discussion of plaintiff’s credibility:

7  
8 The claimant’s activity level does not support her allegation of disability.  
9 Although she reported to Dr. Rao (examining physician) that she needed  
10 assistance from her family, she did a ‘ . . . fair amount of chores at home  
including cooking, cleaning and light laundry work.’ (internal citation to  
Exhibit 10F-3).

11 (Tr. 18).

12 The record cited by the ALJ included the following from Dr. Rao’s report: “[The  
13 claimant] does a fair amount of chores at home including cooking, cleaning, and light  
14 laundry work but does have assistance from family members in doing this” (Tr. 651). The  
15 ALJ relied in part on plaintiff’s daily activities to form the basis of his adverse credibility  
16 determination without finding that they contradicted any specific testimony by plaintiff  
17 and without making a specific finding that plaintiff’s daily activities were transferable to  
18 a work setting, committing legal error (see Tr. 18). See Orn, supra, 495 F.3d at 639. For  
19 this reason, based on the ALJ’s errors in review of the medical evidence and based on the  
20 relevant record, the Court concludes that plaintiff’s testimony should be evaluated anew  
21 following remand of this matter. See id.

1       4. The lay evidence should be considered anew following remand of this matter.

2       The Court already has concluded that this matter should be remanded for further  
3 consideration of the medical evidence, as well as plaintiff's testimony, see supra, sections  
4 2 and 3. For this reason and based on a review of the relevant record, the Court concludes  
5 that the lay testimony should be evaluated anew following remand of this matter. See  
6 Bruce v. Astrue, 557 F.3d 1113, 1115 (9th Cir. 2009) (*quoting Van Nguyen, supra*, 100  
7 F.3d at 1467); see also 20 C.F.R. § 404.1513 (d)(4).

8       5. Plaintiff's residual functional capacity should be considered anew following  
9 remand of this matter.

10       The ALJ erred not only in his review of the medical evidence and plaintiff's  
11 testimony, see supra, sections 2 and 3, but also in his determination regarding plaintiff's  
12 residual functional capacity ("RFC"). The ALJ gave "great weight" to the opinion  
13 evidence offered at plaintiff's hearing by Dr. Nafuosi (see Tr. 18). However, the ALJ did  
14 not explain properly his failure to adopt Dr. Nafuosi's opinion that plaintiff was limited  
15 to working with no concentrated exposure to dust, chemicals, fumes vapors and sudden  
16 temperature changes, as discussed above, see supra, section 2. For these reasons, and  
17 based on a review of the relevant record, the Court concludes that plaintiff's RFC, and  
18 the rest of the five-step sequential disability evaluation process, should be evaluated anew  
19 following remand of this matter. See SSR 96-8p, 1996 SSR LEXIS 5 at \*20.  
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1       6. This matter should be remanded to the Commissioner for further administrative  
2       proceedings.

3       The Ninth Circuit has put forth a “test for determining when evidence should  
4       be credited and an immediate award of benefits directed.” Harman v. Apfel, 211  
5       F.3d 1172, 1178, 2000 U.S. App. LEXIS 38646 at \*\*17 (9th Cir. 2000). It is  
6       appropriate where:

7               (1) the ALJ has failed to provide legally sufficient reasons for rejecting  
8               such evidence, (2) there are no outstanding issues that must be resolved  
9               before a determination of disability can be made, and (3) it is clear from  
10              the record that the ALJ would be required to find the claimant disabled  
              were such evidence credited.

11       Harman, 211 F.3d at 1178 (*quoting* Smolen v. Chater, 80 F.3d 1273, 1292 (9th  
12       Cir.1996)).

13              Here, outstanding issues must be resolved. See Smolen, 80 F.3d at 1292. There is  
14       a large volume of medical and other evidence, and the evidence is not conclusive. In  
15       addition, the ALJ did not evaluate thoroughly the treatment notes and opinions by  
16       plaintiff’s treating physician, Dr. Thorpe, see supra, section 2.

17              The ALJ is responsible for determining credibility and resolving ambiguities and  
18       conflicts in the medical evidence. Reddick v. Chater, 157 F.3d 715, 722 (9th Cir. 1998);  
19       Andrews v. Shalala, 53 F.3d 1035, 1043 (9th Cir. 1995). If the medical evidence in the  
20       record is not conclusive, sole responsibility for resolving conflicting testimony and  
21       questions of credibility lies with the ALJ. Sample v. Schweiker, 694 F.2d 639, 642 (9th  
22

1 Cir. 1999) (*quoting* Waters v. Gardner, 452 F.2d 855, 858 n.7 (9th Cir. 1971) (*citing*  
2 Calhoun v. Bailar, 626 F.2d 145, 150 (9th Cir. 1980))).

3 Therefore, remand is appropriate to allow the Commissioner the opportunity to  
4 consider properly all of the medical evidence as a whole and to incorporate the properly  
5 considered medical evidence into the consideration of plaintiff's credibility and residual  
6 functional capacity. See Sample, supra, 694 F.2d at 642. In addition, remand will provide  
7 the Commissioner the opportunity to evaluate and express the decision in terms of  
8 plaintiff's amended alleged date of disability onset.  
9

### 10 CONCLUSION

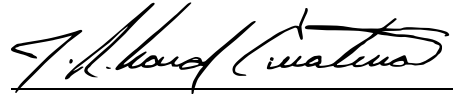
11 The ALJ failed to evaluate properly the appropriate period of alleged disability  
12 and failed without sufficient explanation or legitimate reasons to give controlling weight  
13 to the opinion by plaintiff's treating physician that plaintiff likely would suffer  
14 absenteeism of three or more days a month when attempting even sedentary work full  
15 time. The ALJ also erred in relying on plaintiff's limited daily activities when  
16 considering plaintiff's credibility without a finding of contradiction with plaintiff's  
17 testimony or a finding of transferability to a work setting.

18 Based on these reasons and the relevant record, the undersigned recommends that  
19 this matter be **REVERSED** and **REMANDED** to the administration for further  
20 consideration pursuant to sentence four of 42 U.S.C. § 405(g). **JUDGMENT** should be  
21 for **PLAINTIFF** and the case should be closed.  
22

23 Pursuant to 28 U.S.C. § 636(b)(1) and Fed. R. Civ. P. 72(b), the parties shall have  
24 fourteen (14) days from service of this Report to file written objections. See also Fed. R.

1 Civ. P. 6. Failure to file objections will result in a waiver of those objections for  
2 purposes of de novo review by the district judge. See 28 U.S.C. § 636(b)(1)(C).  
3 Accommodating the time limit imposed by Rule 72(b), the clerk is directed to set the  
4 matter for consideration on March 9, 2012, as noted in the caption.

5 Dated this 13th day of February, 2012.

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8 J. Richard Creatura  
9 United States Magistrate Judge  
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